Date: 09/30/97
Case No.: 96-INA-33

In the Matter of:

BOULEVARD CAFE,
Employer

On Behalf Of:

JOSE TOMAS FRAGOSO,
Alien

Appearance: Eunice Becker, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 24, 1994, Boulevard Cafe ("Employer") filed an application for labor certification to enable Jose Tomas Fragoso ("Alien") to fill the position of Cook, Tex-Mex Style (AF 12-13). The job duties for the position are:

> Prepare and cook Tex-Mex style items on menu such as fajitas, burritos, guacha mole, quesadilla, black bean soup, barbeque ribs and chicken, chili.

The requirements for the position are two years of experience in the job offered. In addition the Employer is requiring a Wednesday through Sunday work week.

The CO issued a Notice of Findings on April 21, 1995 (AF 28-30), proposing to deny certification on the grounds that the Employer's experience requirement is not the actual minimum requirement for the job opportunity.

Accordingly, the Employer was notified that it had until May 26, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 26, 1995 (AF 31), the Employer contended that, although the same individual owns both the restaurant where the Alien gained his experience and the restaurant with the current job opening, the restaurants are different and they serve different kinds of food. Furthermore, the Employer asserted that the restaurant with the current job opening is extremely busy and, therefore, there is no time to train anyone.

The CO issued the Final Determination on May 30, 1995 (AF 32-33), denying certification because the Employer failed to establish that its two-year experience requirement is an actual minimum requirement for the job opportunity.

Discussion

Section 656.21(b)(5) requires an employer to document either: (1) that the requirements it specifies for a job opportunity are its actual minimum requirements and the employer has not hired workers with less training or experience for jobs similar to the one offered; or, (2) that it is not feasible to hire workers with less training or experience than that required by the job offer. Thus, an employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991). The purpose of this section is to prevent employers from requiring more stringent qualifications of a U.S. worker than it requires of the alien. The employer may not treat the alien more favorably than it would a U.S. worker. *ERF, Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

In this case, pursuant to § 656.21(b)(5), the CO instructed the Employer to document that its requirement of two years of experience in the job offered represents the Employer's actual minimum requirements for the job opportunity (AF 28-29). Specifically, the CO noted that the entity with which the Alien gained his qualifying experience [hereinafter "Century"] and the current Employer [hereinafter "Boulevard"] have the same Owner/Manager. As such, the CO questioned whether the Alien gained his experience while employed by a different employer. Accordingly, the CO instructed the Employer to delete the experience requirement or provide evidence that the Alien gained two years of experience with a different employer or provide evidence that it is not now feasible to hire an individual with less than two years of experience. To show that it is not now feasible to hire an individual with less than two years of experience, the CO instructed the Employer to document the following:

1. How many Specialty Cooks (Foreign Food) were employed at the time the Alien was trained;

2. How many Specialty Cooks (Foreign Food) are now employed (besides the Alien);

3. Who trained the Alien;

4. Change in total work force and annual volume of business from the time Alien was hired and trained until present; and,

5. Why a company that has expanded considerably since the Alien was trained has not proportionately developed the ability to train now, as is customary with growth and development.

The Employer's rebuttal appears to contain two arguments (AF 31). First, the Employer contended that Century and Boulevard are different restaurants, although they have the same owner. Specifically, the Employer stated that Century is a "high end restaurant serving complex foods." Furthermore, the Employer explained that Century no longer serves Tex-Mex type of food which is served at Boulevard. Second, the Employer argued that it is infeasible to train another individual. Specifically, the Employer stated that "due to the kind of preparation and cooking style at the Century, the alien was able to be trained at Century. Due to the kind and quantity of food served at the Boulevard, they have no facility to train anyone." Furthermore, the Employer stated that business at the Boulevard Cafe has doubled since its opening and, therefore, it is too busy to train anyone.

We find that the Employer's rebuttal must fail on both arguments. First, in order to prove that the alien gained his qualifying experience with a different employer, the employer must

demonstrate that its ownership and control are separate and distinct from the company where the alien gained his qualifying experience. *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 90-INA-200 (May 23, 1991). Even if the companies are not owned or controlled by the same individuals, the employer may have to show a "distinct operational independence" between the two entities. *Obro Ltd.*, 90-INA-51 (Feb. 21, 1991) (employer may not play "musical employees" to bypass labor certification requirements). In this case, we find that the Employer has not demonstrated that the Alien gained his experience while working at a separate entity. In the NOF, the CO suggested that the Employer may show operational independence by demonstrating that the two entities have separate payrolls and personnel (AF 29). However, the Employer has only offered undocumented assertions that the Alien gained his experience while working at a different restaurant that currently serves different food (AF 31). The fact remains that both restaurants have the same owner/manager. Therefore, the same individual has ultimate control over both entities. Accordingly, we find that the Employer has not met his burden of establishing that the Alien gained his experience with a different employer.

Likewise, the Employer has failed to establish that it is currently infeasible to train another individual. First, the CO, in the NOF, asked the Employer to provide specific information regarding the circumstances at the time that the Alien was trained as compared to the current circumstances. However, the Employer failed to provide most of this information. An employer's failure to produce relevant and reasonably obtainable information requested by the CO is ground for the denial of certification, especially when the employer does not justify its failure. *Vernon Taylor*, 89-INA-258 (Mar. 12, 1991); *STLO Corporation*, 90-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 88-INA-40 (July 5, 1988). Moreover, we note that the employer's burden of establishing that it is not now feasible to offer the same favorable treatment to U.S. applicants has been described as heavy. *58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991). In this case, the Employer has offered only undocumented assertions that the Boulevard Cafe is extremely busy and there is "no opportunity to train anyone." (AF 31). An employer must sufficiently document a change in circumstances to demonstrate infeasibility. See *Rouge and Robelo Restaurant and Bar*, 88-INA-148 (Mar. 1, 1989) (*en banc)*. A bare statement of infeasibility to train is inadequate to establish that an employer cannot now hire workers with less experience and provide training. *MMMATS, Inc.*, 87-INA-540 (Nov. 24, 1987) (*en banc*); *Coastal Printworks, Inc.*, 90-INA-289 (Oct. 29, 1991). Accordingly, we find that the Employer's undocumented assertions are not sufficient to meet the heavy burden of showing that it would be infeasible to train another individual.

Therefore, the Employer has not established that the Alien gained his qualifying experience while working for a different employer or that it is currently infeasible to train U.S. workers. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.